

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**STAGEHANDS REFERRAL SERVICE, LLC**

**And**

**Case Nos. 34-CA-10971**

**STEPHEN FOTI, An Individual**

**INTERNATIONAL ALLIANCE OF THEATRICAL & STAGE  
EMPLOYEES & MOTION PICTURE TECHNICIANS OF THE  
UNITED STATES & CANADA, LOCAL 84, AFL-CIO  
(Meadows Music Theatre)**

**And**

**34-CB-2774**

**STEPHEN FOTI, An Individual**

*Patrick Daly, Esq.*, Counsel for the General Counsel.  
*Leon Rosenblatt, Esq.*, Counsel for the Respondents.

**DECISION**

**Statement of the Case**

**Joel P. Biblowitz, Administrative Law Judge:** This case was heard by me on April 5 and 6, 2005 in Hartford, Connecticut. The Consolidated Complaint herein, which issued on February 28, 2005, and was based upon unfair labor practice charges and amended charges that were filed on September 24, 2004<sup>1</sup>, November 26 and December 29 by Stephen Foti, alleges that Respondent Stagehands Referral Service, herein called SRS, violated Section 8(a)(1)(3) of the Act by failing and refusing to employ Foti because he was not a member of Respondent International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL-CIO, herein called the Union, and that the Union violated Section 8(b)(1)(A)&(2) of the Act by failing and refusing to register Foti for referral and refer Foti to employment because he was not a member of the Union and for reasons other than his failure to tender the periodic dues and initiation fees uniformly required by the Union.

**Findings of Fact**

**I. Jurisdiction**

SRS admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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<sup>1</sup> Unless indicated otherwise, all dates referred to herein relate to the year 2004.

## II. Labor Organization Status

The Union admits, and I find, that it has been a labor organization within the meaning of Section 2(5) of the Act.

## III. The Facts

SRS is a limited liability corporation that was established by the Union and is located in the Union's office. Union President, Charles Morris and Union Business Manager Charles Buckland are the two officers of SRS. One of the largest employers in the area is the Mohegan Sun Casino and Hotel, herein called the Casino, operated by an Indian tribe. The Union established SRS because the Casino, while willing to employ Union members, was unwilling to recognize, or sign contracts with, unions. Consequently, while they would not take referrals from the Union, they would from SRS. Therefore SRS refers Union members and nonmembers to the Casino, sends an invoice to the Casino for all the hours worked by the referred individuals and the Casino pays this invoice. SRS then issues paychecks to all those who were employed at the Casino, with the usual payroll deductions. The Union itself, not SRS, refers individuals to work at other locations in the area with which it has a contract, principally, the Hartford Civic Center, The Meadows and the Bushnell Theatre.

Foti has been engaged in some sort of theatre work for most of his adult life. Prior to moving to Connecticut on November 2001, he worked as a promoter, a stagehand, building and setting up stages and decking, and as an audio engineer in the Los Angeles, California area, the New York area and Cleveland Ohio. In about December 2001 he called the Union and asked about getting referrals to jobs and was told to call the Union Business Manager on Mondays, which he did and, beginning about five months later, he began getting referrals to the Casino, the Civic Center, Bushnell and The Meadows. In addition, Local 52, a sister local of the Union, put in a call for help and Buckland sent him to a job in New Canaan, Connecticut. These job referrals continued through May.

The Union rules provide that individuals can apply for Union membership after performing unit work for eighteen months, and Foti applied for Union membership in April. He went to the Union hall, completed the application, and paid the required fees, including a \$100 fee for a background check which he passed. The next step for Foti and the nine other applicants in the application process was an interview on April 26 with the Union's Executive Board, composed of Buckland, Morris and other officers of the Union. He was questioned by members of the Executive Board about his commitment to the Union and their referrals and Foti assured them that he would be able to commit, and his application was approved by the Executive Board. Following the Executive Board meeting there was a regular membership meeting of the Union in which the applicants' qualifications for membership was discussed by the members. Voting was to take place at the following membership meeting on May 24.<sup>2</sup> Member Jason Philbin testified that he spoke at this meeting and told the membership that he worked with Foti more than most of the members, and that he was going to vote against him because he was lazy and often late on the jobs. Member Stella Cerullo testified that to her recollection, only Philbin spoke directly about Foti, although there were comments that the members should "...vote our conscience...and we know that there are people on that list that are not qualified to come in so...you should think about it before you actually vote." Member

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<sup>2</sup> Foti testified only about the May 24 meeting, where the voting place, apparently, because the applicants were not present at the regular Union meeting on April 26.

Michael Philbin testified that he voted against Foti at the May meeting because he felt that Foti was not a "team player."

5 Morris testified that he was amazed at the number of people who spoke negatively about Foti at this meeting. A number of members expressed concerns that they didn't feel safe working alongside of him, and were concerned with his work ethic and habits. He did not anticipate these comments because he had never worked on the same crew with Foti. Buckland testified that at this meeting each of the applicants was discussed in alphabetical order and there were questions about each of the applicants, but there were more hostile comments about Foti then any of the other applicants.

10 The actual voting took place at the next meeting on May 24. At this meeting the members were reminded that the Union constitution provided the criteria for Union membership: that applicants must display aptitude, a good work ethic and trade skills, and a commitment to enhance the causes that embody trade unionism. Foti testified that he and the other nine applicants were seated in the front row when the meeting started, and prior to the voting, they were escorted to a room next door. About forty five minutes later Morris came into the room and said that nine of the applicants had been accepted and one had not. He asked the other nine applicants to go back in to the meeting room and he asked Foti to stay where he was, which signified to Foti that he was the one who was rejected for membership. He asked Morris, "How can that be?" All Morris said was that he was surprised, he didn't expect it. As Morris was escorting him out of the room past the membership, he told Morris that it was the most embarrassing thing he ever experienced, but he never told Morris, at that time or at any time, that he no longer wanted to be referred to jobs by the Union. Morris testified that after opening the May 24 meeting, he introduced the applicants and had them leave the room until the members voted. The vote on Foti's application was 11 in favor, 33 against. All the other applicants were accepted. That was the first occasion that he could remember where an applicant was rejected for membership by the members. He then left the meeting room and told Foti that his application had been rejected. As they were leaving the room, he asked Foti, "What do you want to do?" Foti responded, "I'm too embarrassed to be around you guys." They shook hands, and Foti left the meeting. Morris testified that he "took" Foti's words to mean that he was too embarrassed to be working with them or to be around them, and that is what he relayed to Buckland about this conversation with Foti a few days later when they talked about what they were going to do and what the vote meant.

35 Buckland testified that he was surprised by the vote rejecting Foti's membership application. Even though there were anti-Foti comments at the prior meeting, that had happened before, but applicants had never previously been rejected. Buckland was then asked whether he drew any conclusions from the vote. He testified, *inter alia*:

40 ...Mr. Foti definitely worked a lot and because he said yes a lot...there were several times he was unavailable, but that was his option as an extra. I didn't have any problem with that.

45 But when he was available, I don't recall a whole bunch of time...that he would refuse work. He would go almost anywhere I asked. So, what I felt, although it was a great sacrifice to me, that the body, the membership, had sent me a clear and concise signal that the man was not a competent person to work with and I would have to discontinue hiring him.

50 And...it's inherently my job as a business agent for the employers who I negotiated with...to find a better wage and...better conditions for them, to send them a person who,

who I've been entrusted with sending them competent, professional people...I would be a hypocrite to continue to work and entrust myself to the employers, and to turn around and send incompetent stagehands.

5 He testified that prior to the vote, he was not aware of the problems that the members had with Foti's work: "Mr. Foti flew under the radar." A few days after the meeting, Buckland asked Morris, "Where do we go from here?" Morris told him that Foti's response to the vote was that he was too embarrassed to work, he doesn't know how he could work with the members after the vote of no confidence.

10 Buckland testified that Foti called him a few days later and asked about the possibility of work and Buckland mentioned the vote of the members. Foti then asked if that meant that he couldn't work for SRS at the Casino as well, and Buckland responded: "As far as I'm concerned, we're both the same...In other words, I'm not going to send inferior people to one place that I wouldn't send to another." Buckland was then asked:

Q Did you tell him he could never work with Local 84 again?

20 A I believe it was more like, at this time, I don't think it would be a good idea. There was also the case...he was just voted not to work, there's a potential for a hostile situation, plus I'd give him an opportunity to improve his job skills, work skills. So...I did not close the door.

25 Foti testified that his last job ended on about May 29 and since he had not heard from Buckland with any referrals, he called Buckland at that time and asked him if any work was available and Buckland said that he couldn't take calls from the Union because his application had been denied. Foti asked if there he could work as an extra through SRS, and Buckland said, "No, you cannot take any of those calls." Buckland added that it was unfortunate because Foti was a "Yes man" when he offered him work, and he needed that. That was the last time that Foti called the Union looking for referrals: "I was told there was no work for me."

30 Foti testified that his next contact with the Union was a telephone call that he received in late November from Morris, who told him that there was work available and that if he wanted it, he should call Buckland on Monday. During this conversation Foti told Morris how angry he was at the way things happened six months earlier. Pursuant to Morris' instructions, Foti called 35 Buckland on Monday, and Buckland referred him to a job about ten days later in early December. Foti called Buckland next in about late March 2005, but Buckland told him that all the calls for that week had been booked. Foti asked if he should call back on Monday, and Buckland answered yes. Morris testified that he called Foti on November 24 because SRS 40 received a notice of liability from Unemployment Insurance regarding Foti. He was "a little perturbed" about this notice because Foti had not been calling in requesting work, yet he filed an Unemployment claim against SRS. He called Foti and asked, "What's up. Why aren't you calling in on Monday morning?" Foti was angry. He said that the Union had fucked him, and he was going to fuck the Union. Morris told him not to be so confrontational, and Foti said that he 45 was going to hurt Jason Philbin and Bob Burns the next time he saw them because they spoke against him at the Union meeting. Morris asked Foti why he was trying to collect, when he never told the Union of his availability to work. Morris also reminded him that in May he told Morris that he was too embarrassed to work with the members, and Foti said that he didn't remember having said that. Morris told him to call Buckland on Monday, November 29, which he did and 50 he was referred to work, and Foti did not call again until the end of March.

As stated above, the allegations herein are that SRS failed to employ Foti after May 24

because he was not a member of the Union and that the Union failed to refer Foti to employment because he was not a member of the Union, in violation of Section 8(a)(3) and 8(b)(1)(A)&(2) of the Act. The Union and SRS defend that the refusal had nothing to do with his lack of Union membership. Rather, the meetings in April and May made them aware of Foti's poor work, and they did not feel comfortable referring a poor employee to the employers with whom they deal. According to the Union and SRS, Foti's poor work performance falls into a number of categories: lateness, a lack of initiative on the job, coming to work without all the required tools, and his unsafe work performance. There was also some testimony regarding whether Foti refused referral calls from the Union. However, because Buckland testified that he was sorry to lose Foti because he was "a yes man," generally available for calls, that issue will not be discussed further.

Union member Robert Tabara testified that he voted against Foti at the May meeting because of his work ethic, his lateness to work calls, and his lack of initiative in not being willing to assist others. As regards lateness, he testified: "...it just shows what type of person you are. Are you responsible? Are you obligated to your job or not? 90-98% of the local knows that being on time is one of the main important things..."

He testified that he worked with Foti on about twenty occasions and that was late on about five of those occasions although he could not estimate the length of time that he was late. He remembers, because: "...it's noticeable when everybody is working and all of a sudden one of the guys walks in late...everybody sees it." He testified that if you are one minute late or five minutes late, it doesn't matter, you're late: "There's no leeway." Other stagehands have been late as well. Union member Stella Cerullo testified that the impact of a stagehand being late depends upon the size of the crew working on the event: "If it's a large crew, probably not much of an impact. If it's a smaller crew of, let's say, ten people...it could make a big impact." Jason Philbin testified that he has worked with Foti on from fifty to one hundred occasions and spoke at the April meeting and said that he was going to vote against him because he was lazy and was often late to assignments. He estimated that Foti was late on about ten occasions, with a range of from one minute to thirty minutes. Philbin himself has been disciplined by the Union's Executive Board for not appearing for a job. He overslept and by the time that he called the Union, he had been replaced on the job. The Union's Executive Board told him that he would be disciplined by no longer being assigned to the show that he missed. Michael Philbin, the lead and steward at the Casino, testified that Foti worked at the Casino on approximately one hundred fifty occasions and was late on about half of the days, for between five and ten minutes. Member Patrick Whelan testified that he has worked with Foti on about fifty occasions and he reported five to ten minutes late from 20% to 40% of the time. Foti testified that he is punctual and reliable in getting to the jobs on time and during the two and a half years that he was referred by the Union and SRS he was late on about three occasions for between two and three minutes.<sup>3</sup>

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<sup>3</sup> A lateness report for the Casino, for the period August 23, 2003 through December 9, 2004, prepared by Michael Philbin, "when I have time to do it" states that Foti was thirty minutes late for a job on February 20. The reason that he gave for being late was that he thought the call was for 10:30, not 10:00. There are 112 other latenesses in this report covering a sixteen month period. Tabara is listed once as being forty two minutes late because he overslept, Whelan is listed once as a "no show" because of car trouble, and Jason Philbin was sixteen minutes late on one occasion because he was stuck in traffic, and was a no show/no call on three occasions. Whelan prepared a lateness report for the Meadows venue for the period of about November 2003 through about July 2004. It lists thirty five employees who were late a total of forty nine times. Of this total, Foti was late twice for five minutes and fifteen minutes.

There was also testimony from Union members that Foti did not show enough initiative on the job. Tabara testified about his difficulty with Foti's work:

5           ...Steve was holding the cart rather than...giving the extra effort of helping somebody out with a heavy piece...Not take the extra initiative to pitch in and...just give an extra effort...that's somebody who I don't feel is worthy to become a full time member. Why would I want to vote in somebody like that when they're not giving it their all 100% all the time?

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Regarding what he referred to as Foti's lack of initiative, he testified:

Very lackluster. Just go through the motions instead of...what do we have to do next? What can I do next for you? What needs to be done? Who can I help out? Instead of...taking the initiative to go and ask what you can do instead of being told hey Steve, come with me, do this...

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Cerullo testified:

20           We have...people that are leaders and we have people that are followers...your objective is to help...the road crew. They're the people that are touring. They're the people you're supposed to be there for in lieu of them traveling with their own 500 person crew to set things up. And your job is to go to them and continuously ask them what they need help with next. You're supposed to jump in, take the initiative, and essentially help everybody out. Some people need to be babysat, or handheld, or dragged along and some people don't...Nine times out of ten we would have to coax him [Foti] into stepping up or pitching in a little bit more than the rest of us.

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30           ...you're putting deck together, there are people that will jump in and take the weight of that job and then there are people that will stand on the sidelines and wait to be told what to do.

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35           So you have the option to pick the easy job out of the group. You also have the option to stand there and wait for somebody to say, hey, can you give us a hand or, hey, can you jump in or, hey, do you mind doing that? That's the difference between a person that's stepping up and taking leadership and a person that's just there as a background being prompted to do something.

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40           She testified that, in her opinion, there are three categories of employees, leaders, followers and standby persons, the latter being warm bodies that need to be handheld; in her opinion, Foti fell into this latter category and that is one the reasons that she voted against him in May.

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45           Jason Philbin testified that Foti , "...was somebody who doesn't take initiative, who stands there and watches everyone else do something until he's asked to do something. And then he may or may not do it even if he's asked." Whelan testified to a situation at the Meadows in 2003 when Foti complained that his assignment that day was as a loader and he threatened to leave because of it. Whelan calmed him down and convinced him that it would not be a good idea to leave the assignment, and Foti returned to work. He testified that he voted against Foti at the May meeting because he needed continuous direction, he would not follow recommendations and he was argumentative. He testified that Foti "...was kind of argumentative sometimes when someone, the tour people who travel with the tour know what needs to be done, and our job is just to zip it and do it." Foti was "Focusing more on his ideas of

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how it should be done, instead of focusing on doing it.” He testified further that Foti “...needed continual direction or you’d explain something to him and...he would go off to do something else.” Whelan, who considers himself as an experienced stagehand, testified that when he tried to explain something to Foti, Foti was “...argumentative and...not really willing to accept [his] foresight and knowledge.”

Member Alfonso Lopez, a rigger, testified that as a rigger he is stationed from 60 to 90 feet above the stage, and from there: “You can see guys that are working, you can see guys that aren’t working.” He has worked with Foti on, at least, fifty occasions. There were occasions when he saw Foti standing around, rather than moving around like other crew members and on about ten or twenty occasions, when Lopez came down from the rigging, he saw Foti, whom he hadn’t seen from the rigging. He testified that Foti could not have been performing his work without Lopez being able to observe him from the rigging. He testified that he voted against Foti at the May meeting because he didn’t agree with Foti’s work ethic:

...the people I like to work with are people that don’t need direction, that know what they’re doing, they come prepared. And Steve, for some reason, needs a lot of direction. He needs to be told what to do, when to do it. After you’ve done this enough times, you know when to do it...you just fall in and just do what you’ve got to do to get the job done.

Finally, Lopez testified that the day prior to his testimony herein, he was having difficulty with another employee, Brian Fulco, who was standing around and talking, rather than working. When Lopez told Fulco to hurry up and do some work, Fulco responded with a mean look and said, “Who do you think I am, Steve Foti?”

Foti testified that in about 2002, after he had performed a job at the Casino, Mike Philbin, the lead at the Casino, told him that in the twenty years he has been in the business he had never received the compliments on anybody’s work as he had received for Foti. In addition, Foti was sent to a one day job for a different local union, but because of his work, he was complimented and the job lasted for thirty days.

Another complaint about Foti is that he did not have his tools, or enough tools, with him when he came to jobs. Tabara testified to a job at the Meadows in 2003 when he and Foti were deck carpenters, but Foti, “...didn’t come to work prepared. Most people come to work prepared with a bag of tools. He didn’t have his tools on him.” Cerullo testified that when she goes to a call, she brings a tool bag containing a hammer, an Allen set, vice grips, and certain standardized tools. In addition, she carries a tool belt, which has a knife, a wrench and a flashlight. She has seen Foti carrying a wrench to the jobs, but doesn’t know what other tools, if any, that he has at jobs.

Finally, there was testimony of a safety issue involving Foti. Mike Philbin testified to a situation in June 2002 when Foti was assigned by the then business representative to operate a truss spot, which involves a 30 to 40 foot high structure. The operator is required to climb to the top of the structure, sit in a chair at the top, and operate a spotlight from there. Before Foti went up the structure, Philbin asked him if he was alright with the assignment, and he said that he was. Foti climbed up the ladder and when he got to the top, he failed to connect the safety line to the lifeline attached tightly to himself: “He was actually free up there. And the electrician was going bonkers. And we were both yelling...hook in, hook in. And, after a while, he made it to the chair and then he realized, he hooked in.” At 6:00, when Foti came down, Philbin told him that the next time he goes up, the first thing he should do is to hook in and Foti agreed. After dinner, Foti went back up and, again, failed to hook in until Philbin and the electrician yelled to him to hook in. The danger was that Foti could fall from the truss because he was not secured. Whelan

testified about a situation in 2003 when Foti was operating an electric motor that is attached to chains and cable that lifts the lights and sound equipment above the stage. Whelan noticed that Foti was operating the motor with the control, called a “pickle”, but was not watching the motor as it was being operated and Whelan saw that the cable was about to be pulled into the gears of the motor, which could have chewed up the gears, exposed the electric wires and, possibly, caused major electrical damage. Whelan hollered for Foti to stop the machine, and he did so. Afterward, he told Foti that he had to focus more on what he was doing and to pay attention.

Morris and Buckland testified generally about the importance of referring only qualified employees to jobs. Morris testified that the Union was in negotiations with some of the employers and is in an adversarial position with one, Bushnell. Because of that, the Union must “put our best foot forward” by only referring competent individuals to jobs. In addition, Morris has attempted to eliminate disparity in treatment; if a non-member is going to be penalized for being late to a job, the Union was also going to penalize members, such as Jason Philbin and another member, Gene Graves, for being late or being a no show. Buckland testified that he has been involved in three negotiations with these employers, which has resulted in better wages and working conditions for the members and extras, and in return he feels the obligation of referring only competent, professional people to work at these locations. Buckland named twelve extras who no longer received referrals because they either were found to be incompetent, walked off jobs, or had drug problems. He testified that there may be more, as well, and that one or two of those named may have returned to the Union’s referral list by understanding the problem and retraining and correcting their problems.

Finally, Counsel for the Respondents sent two position statements to the Region regarding the unfair labor practice charges herein. The first, dated November 8, states, *inter alia*, that after Foti’s membership was rejected by the members, he “...told the Union’s president that he was too embarrassed by the vote to work under the auspices of Local 84.” He further stated in this position statement: “...the Union would have referred the charging party to a job if the charging party had wanted to take a job, and if a job were available.” In a position statement two weeks later, counsel states:

Mr. Buckland denies that he told Mr. Foti he would never be referred to jobs. What Mr. Buckland recalls is that after the vote of the membership Mr. Foti asked him about an SRS referral, and Mr. Buckland said that “under the circumstances” he did not see how he could make that referral. The “circumstances” were that he had learned from members that Mr. Foti’s membership had been voted down because they considered him to be an unreliable coworker, and even dangerous.

#### IV. Analysis

This is not the usual Section 8(a)(3) and 8(b)(1)(A)&(2) case where an individual is not hired, or is fired, by an employer because of his union or protected concerted activities case, or where a union has an individual fired, or fails to refer him to jobs, because of his intra-union or other protected concerted activities. In addition, there is no evidence of animus on the part of either the Union or SRS (which *really* is the Union). Prior to May, Foti was getting his fair share of referrals and, in April, the Union’s Executive Board approved his membership application. It was not until the April membership meeting, when negative opinions were expressed about Foti’s work, and the May meeting, where his membership application was rejected, that his referrals ceased.

It is true that since May 24 both the Union and SRS have failed to refer Foti to employment, with the exception of the November referral. The determinative question, however,



is whether the Union and SRS failed to refer him for a prohibited motive. In *Operating Engineers, Local 18 (Ohio Contractors Association)*, 204 NLRB 681 (1973), the Board stated:

When a union prevents an employee from being hired or causes an employees' discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer-or, if you please, adopt a presumption that-the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power. But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also...where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.

I conclude that the Respondents have established that their failure to refer Foti to employment after May 24 was "necessary to the effective performance of its function of representing its constituency."

I found all the witnesses to be credible, with the exception of Jason Philbin, who appeared to be overly careful in his answers, especially in answer to questions from Counsel for the General Counsel. His reluctance may be due to the fact that his work record is less than exemplary. Although it is difficult to reconcile Foti's testimony about his work abilities with the testimony of Tabara, Cerullo, Michael Philbin, Whelan and Lopez, I don't believe it is necessary or possible for me to make a direct credibility finding as to these witnesses and that issue. At the May 24 meeting, nine of the ten applications for membership were approved by the members; only Foti's was rejected, and that was the first time that an applicant been rejected by the membership. No evidence was adduced by Counsel for the General Counsel to establish any animus or unlawful purpose in that rejection. Absent any other reason, the only reason that I could adduce from the membership's rejection of Foti's application is that they found his work and tardiness lacking. Therefore, although Foti appeared to be a credible witness, I indirectly discredit him because I could find no reason to discredit the other equally credible witnesses. *Blue Flash Express, Inc.*, 109 NLRB 591-592 (1954); *Old Dominion Freight Line, Inc.*, 331 NLRB 111, fn. 1 (2000). I also found Morris and Buckland to be credible witnesses whose testimony was reasonable. They seemed honestly surprised and disappointed by the membership's rejection of Foti, Buckland because Foti was generally available for referrals, when needed. I also found credible Morris' testimony that the Respondents have to put their best foot forward with the employers with whom they deal by only referring competent employees to these locals, and based upon the statements made about Foti at the April 26 meeting, and the lopsided vote against him at the May 24 meeting, he assumed that Foti was not a competent worker.

Admittedly, after the membership vote on May 24, Foti told Morris that he was embarrassed by the vote. However, I credit his testimony that he did not tell Morris that he was too embarrassed to ever work with the members again. In fact, a week later he called Buckland asking for work. I credit that testimony over Morris' testimony that Foti said that he was too embarrassed "to be around you guys" which he took to mean that he didn't want to work with them anymore.

The principal argument of Counsel for the General Counsel is that the Respondent's violated the Act herein by not referring Foti to work after May 24 because on that day his membership application was rejected. Therefore, he argues, his failure to obtain referrals was caused by his union activities, his unsuccessful attempt to join the Union. This is an overly simplistic view of the facts, however. While it is true that on April 26 and May 24 his membership

application was rejected, it was on those dates that Buckland and Morris learned for the first time from the members of Foti's shortcomings as a stagehand, and *that*, not the rejection of his membership application was the real reason for his not receiving referrals after May 24. Further, as counsel for the Respondent argues in his Brief: "The fact that Foti worked as an extra regularly with SRS and was referred out regularly by Buckland completely undercuts any claim that Buckland, or Local 84, or SRS, was motivated positively or negatively by Foti's membership status."

In an analogous situation, *Operative Plasterers & Cement Masons, Local No. 299 (Wyoming Contractors Association, Inc.)*, 257 NLRB 1386 (1981), the Board found that the Union did not violate the Act by refusing to refer Jimmey Hamilton to work. In making this finding, the administrative law judge stated, *inter alia*:

I have found that the Union's judgment as to Hamilton's lack of journeyman skills was the only reason why Hamilton was not included in the "A" or priority referral group. There is a total absence of evidence of any bad faith or hostile considerations on Richard's or Sandra's part in making this judgment. I have further concluded that this judgment was not based on arbitrary, whimsical or irrelevant considerations. Rather, it was genuinely based on objective indications that Hamilton's background experience was marginal...and further on objective indications that he was a substandard performer...

Two other cases, while not right on point, are helpful herein. In *International Longshoremen's Association, Local No. 341, AFL-CIO (West Gulf Maritime Association)*, 254 NLRB 334, 337 (1981), the membership voted to bar the charging party from the use of the hiring hall and to expel him for instigating picketing regardless of a no-strike clause in the union's contract. In dismissing the Complaint, the administrative law judge stated, *inter alia*:

The legitimate interests of a union must be carefully balanced against the interests of individual employees when those employees are engaged in protected activity, but in this case there was no protected activity.

In *Moving Picture Projectionists Local 150, IATSE (Mann Theatres)*, 268 NLRB 1292, 1296 (1984), the union received numerous complaints about the charging party's work and work habits, and many of the employers requested that he not be referred to their theatre again. In dismissing the Complaint, the Board found that, "...the Respondent used reasonable judgment, considering all that had transpired...in concluding that further referral of Simon would jeopardize its position as the exclusive supply of the employer's employees." In *IATSE, Local 720*, 332 NLRB 1, 3 (2000), the Respondent had expelled the charging party from its hiring hall for misconduct toward fellow employees and employers, and ten months later when the charging party reapplied, the Respondent refused to reconsider the expulsion or its refusal to refer him. The Board dismissed the Complaint stating, *inter alia*:

The critical inquiry therefore is whether the Respondent acted arbitrarily in its treatment of Lucas, because the Respondent's actions in operating its exclusive hiring hall must, of course, comport with the duty of fair representation. To establish "arbitrary" conduct, it is not enough to show errors in judgment, or that a more prudent union would have acted differently. To establish arbitrary conduct necessary for a breach of the duty of fair representation, it must be shown that the union acted in a way that is "so far outside a 'wide range of reasonableness'...as to be irrational." That showing has not been made here.

The only evidence of pretext on the part of the Respondents is the conflict between

counsel for the Respondent's two position statements, and Morris and Buckland's limited testimony that they felt that Foti did not want to be referred because he said that he was embarrassed to be with the members because they rejected his membership application. However, I find that this is not enough to overcome the balance on the credible testimony of most (all except Jason Philbin) of the Respondents' witnesses. I therefore find that the Respondents failed to refer Foti for valid reasons, and I therefore recommend that the Complaint be dismissed in its entirety.

### Conclusions of Law

1. The Respondent SRS has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondents did not violate Section 8(a)(1)(3), Section 8(b)(1)(A) or Section 8(b)(2) of the Act by failing to refer Stephen Foti to employment after May 24.

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

### ORDER

It is recommended that the Complaint be dismissed in its entirety.

**Dated, Washington, D.C.**

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**Joel P. Biblowitz**  
Administrative Law Judge

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<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.